

# METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY



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March 21, 2018

## SUBMITTED ELECTRONICALLY VIA ECFS

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: **MEETING SUMMARY PER SECTION 1.1208 OF THE FCC'S RULES**  
Schools and Libraries Universal Service Support Mechanism,  
Docket No. 02-6

Dear Ms. Dortch:

On behalf of the Metropolitan Nashville Public Schools, #BEN 128258 (MNPS), this *ex parte* memorializes a meeting between representatives of MNPS and Commission staff. On March 19, 2018, MNPS Director of Schools Shawn Joseph along with Jeff Brooks from Adams & Reese and legal counsel Corey Harkey met with Bryan Boyle, Elizabeth Drogula, James Bachtell, and Kate Dumouchel of the Wireline Competition Bureau (WCB) regarding Request for Review and/or Waiver filed on behalf of MNPS.<sup>1</sup>

MNPS discussed its work in introducing coding to middle and high school students and its focus on Science, Technology, Engineering, Arts and Math, or STEAM, that E-rate funding has allowed it to provide its students. On the merits of the appeal, we explained how MNPS had not violated the red light rule as it satisfied the payment within two weeks of receiving actual notice, and alternatively, a waiver would serve the public interest. It is unjust, especially in the complete absence of fraud, waste, or abuse, to withhold approximately \$3.5 million dollars in E-rate funding over a two-week delay in making a \$1,500 payment. As such, MNPS respectfully requested that the Bureau grant the request for review in a public notice.

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<sup>1</sup> Request for Review and/or Waiver, *In the Matter of Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Metropolitan Nashville Public Schools FCC Form 471 Application Numbers 161054574, 161055248, 161055512, 161055858, 161055933, 161056945, 161057175 *et al.* (filed October 20, 2017).

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Additionally, MNPS explained that this issue could be addressed without implicating the red light rule by allowing MNPS to file an appeal of the \$1,500 debt. In 2009, the Wireline Bureau directed USAC not to seek recovery if the applicant could show the entity was eligible.<sup>2</sup> Thus, even for a 2012 clerical error, USAC should not have sought recovery of this \$1,500 amount for this eligible school but should have notified MNPS and allowed MNPS to modify their FCC Form 471 to include this eligible school. The FCC's Modernization Order in 2014 codified the allowance of an applicant to add eligible schools within its district that were inadvertently omitted from its applications, even after the deadline for making changes to the FCC Form 471.<sup>3</sup> If the same clerical error in omitting an eligible school from the Form 471 occurred today, MNPS would be allowed to correct the error without penalty and should have been allowed to do so after the 2012 clerical error.

In this case, upon receiving notice of the debt via the notice of dismissal on January 10, 2017, MNPS chose to pay the \$1,500 debt rather than file an appeal. However, MNPS could appeal the \$1,500 debt if given a waiver of the deadline to file an appeal. The Commission has previously waived the appeal deadline when due to a mistake by USAC.<sup>4</sup> In this case, although MNPS erred in inadvertently omitting the eligible school from its Form 471, USAC erred in seeking recovery of the payment after being instructed to allow applicants to add eligible schools. Therefore, the Commission could waive the appeal deadline and allow MNPS to file an appeal of the \$1,500 debt.

During the meeting, there was also a question about cases or cites that support the Commission's waiver of the red light rule where it serves the public interest. In *Northstar*, although based on different facts, the Commission found that "the public interest, convenience and necessity would be served by granting a limited waiver" of the red light rule.<sup>5</sup> Cases have also held that the Commission may take hardship, equity, or more effective implementation of

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<sup>2</sup> *Schools and Libraries Program, "Table C" recovery issues*, DA 09-86, WC Docket No. 02-6, pg. 2 (January 16, 2009). See Attachment 1.

<sup>3</sup> *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 13-184, at para. 218 (released July 23, 2014).

<sup>4</sup> *Request for Review and/or Requests for Waiver of the Decisions of the Universal Service Administrator by Animas School District 6, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-427902, et al., CC Docket No. 02-6, Order, DA 11-2040, at para. 4 (released Dec. 22, 2011) (granting waivers for late filed appeals because the applicant filed within a reasonable time of receiving actual notice or because the appeal would not have been necessary, but for an error by USAC).

<sup>5</sup> *In re Applications of Northstar Tech., LLC for Renewal of Licenses for PCS Stations KNLH637 and KNLH638*, File Nos. 0002985324, 0002985321, Memorandum Opinion and Order, 24 FCC Rcd. 13476, at 13480 ¶ 13 & n.46 (2009) (citing 47 C.F.R. § 1.3; *Northeast Cellular*, 897 F.2d at 1166; *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)); see also *In re Applications of Northstar Tech., LLC for Renewal of Licenses for PCS Stations KNLH651 and KNLH653*, File Nos. 0002985320, 0002985315, Memorandum Opinion and Order, 23 FCC Rcd. 9122 at 9130 (2008).

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overall policy into account on an individual basis.<sup>6</sup> The Commission has also granted waivers in cases that are factually similar to this case. In *Archer*, the Commission granted a waiver where the applicant had failed to reference all of the entities in its funding request.<sup>7</sup> Even in its February public notice, the Commission granted three appeals to allow the correction of a ministerial and/or clerical error.<sup>8</sup> It is worth noting that the *Haskell* appeal that was granted was also filed late, in that the applicant did not appeal within 60 days of the FCDL because it did not realize the error until later.<sup>9</sup> In this case, MNPS should also be granted a limited waiver of the red light rule, or be allowed to correct its 2012 clerical error, to serve the public interest and as equity requires.

The attached handout summarizing the arguments presented in the appeal was distributed. And pursuant to Section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed for inclusion in the above-referenced docket and courtesy copies are being sent to the attendees. Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,



Corey Harkey

cc: Bryan Boyle (via email)  
Elizabeth Drogula (via email)  
James Bachtell (via email)  
Shawn Joseph (via email)  
Jeff Brooks (via email)

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<sup>6</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

<sup>7</sup> *Requests for Review of Decisions of the Universal Service Administrator by Archer Public Library et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 23 FCC Rcd 15518, 15521, n.19 (WCB 2008) (permitting correction when applicant failed to reference all of the entities on which it based its funding request); *See also, Requests for Waiver and Review of Decisions of the Universal Service Administrator by Ann Arbor Public Schools et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 25 FCC Rcd 17319, 17320, para. 2, n.5 (WCB 2010) (permitting applicants to correct an omission of an item on its FCC Form 471, which was on its source list).

<sup>8</sup> [https://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2018/db0228/DA-18-175A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0228/DA-18-175A1.pdf)  
*Haskell Independent School District 2, OK*, Application No. 171017943, Request for Waiver, CC Docket No. 02-6 (filed Feb. 12, 2018)  
*Romoland School District, CA*, Application No. 1008699, Request for Waiver, CC Docket No. 02-6 (filed June 30, 2016)  
*Southeastern Public Library System of Oklahoma, OK*, Application No. 161032195, Request for Waiver, CC Docket No. 02-6 (filed Jan. 16, 2018)

<sup>9</sup> *Haskell Independent School District 2, OK*, Application No. 171017943, Request for Waiver, CC Docket No. 02-6 (filed Feb. 12, 2018)



Federal Communications Commission  
Washington, D.C. 20554

January 16, 2009

DA 09-86

Mr. Scott Barash  
Acting Chief Executive Officer  
Universal Service Administrative Company  
2000 L Street, N.W.  
Suite 200  
Washington, DC 20036

Re: Schools and Libraries Program, WC Docket No. 02-6  
"Table C" recovery issues

Dear Mr. Barash:

This letter responds to the outstanding policy issues regarding recovery of funds in the schools and libraries universal service program, also known as the E-rate program, on which USAC has sought formal guidance. On March 8, 2006, USAC submitted a memorandum proposing action regarding schools and libraries commitment adjustments and funds recoveries. In that memorandum, USAC submitted lists of recovery situations in a table format: Tables A, B, and C.<sup>1</sup> Table C contained scenarios that were not specifically addressed in the *Schools and Libraries Fifth Report and Order*, and USAC had proposed to seek recovery for the violations listed in Table C.

Those Table C scenarios are outlined in the attached chart. The chart provides our guidance as to when recovery should occur. Generally, we agree with USAC's recommendations to process recoveries for the scenarios listed. However, in certain instances we believe that recovery might not be appropriate for particular factual situations, as explained in detail below and as noted on the chart.

Children's Internet Protection Act (CIPA) Violations: USAC recommended complete recovery in every instance in which the applicant did not comply with all CIPA requirements, which require a school or library to certify that it is enforcing a policy of Internet safety that includes measures to block or filter Internet access for minors and adults to certain visual depictions.<sup>2</sup> We note, however, that, in certain instances, although the applicant may not have been in technical compliance, there was substantial compliance with the spirit of the CIPA requirements. For example, an audit found that Little Rock School District (Little Rock) was not in compliance with the CIPA requirement to have in place an

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<sup>1</sup> Table A contained scenarios that were specifically addressed in the *Schools and Libraries Fifth Report and Order* and in which there was a specific reference in the *Schools and Libraries Fourth Report and Order* as to the party from whom recovery should be directed. Table B contained scenarios that were specifically addressed in the *Schools and Libraries Fifth Report and Order*, but did not have a specific reference in the *Schools and Libraries Fourth Report and Order* as to the party from whom recovery should be directed. See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, (2004) (*Schools and Libraries Fifth Report and Order*); *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 97-21, 02-6, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252 (2004) (*Schools and Libraries Fourth Report and Order*).

<sup>2</sup> See 47 C.F.R. §54.520.



Internet safety policy that addressed measures designed to restrict minors' access to harmful materials. Although Little Rock's Internet safety policy did not address this point, Little Rock did have in place an Internet filter that restricted minors' access to harmful materials. In this case, recovery is not warranted.

Services Delivered to an Entity Not Listed on the FCC Form 471: USAC recommended complete recovery in every instance in which services were delivered to an entity that was not listed in the applicant's FCC Form 471. Pursuant to the Commission's direction in its *Bishop Perry Order*, however, USAC has allowed applicants to modify their FCC Forms 471 for clerical and ministerial errors.<sup>3</sup> Accordingly, an applicant first must be given an opportunity to show that the omission of such entity from the FCC Form 471 was a ministerial or clerical error. If such entity would otherwise be eligible, then recovery is not warranted.

No Signed Contract (2004 and Beyond); No Legally Binding Agreement (2003 and Before): Starting in 2004, USAC denied the validity of contracts unless they were signed and dated by both parties. USAC also began to distinguish between contracts and legally binding agreements. USAC based its actions on language in the *Schools and Libraries Fifth Report and Order*, which states that, for recordkeeping purposes, applicants and service providers should keep "executed contracts, signed and dated by both parties."<sup>4</sup> Consistent with the Commission's direction, contract guidance information posted on USAC's website no longer requires a contract to be signed and dated by both parties.<sup>5</sup> Thus, USAC should not recover funding if there was a binding agreement that was legal under state law.

Equipment Not Utilized: USAC recommended recovery in every instance in which equipment was not utilized: for example, the equipment was installed but not connected to any computers, or some equipment was still in its original packaging and had not been installed. There could be situations that would justify a decision to not recover funds. For example, in one of the audits, Brownsville Independent School District delayed installation of all equipment due to human resource limitations, but anticipated that very shortly all of the equipment would be installed. In this instance, if the equipment was subsequently installed, recovery would not be warranted.

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<sup>3</sup> See *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316 (2006) (*Bishop Perry Order*).

<sup>4</sup> *Schools and Libraries Fifth Report and Order*, 19 FCC Rcd at 15824, para. 48.

<sup>5</sup> See USAC website, Contract Guidance, <http://www.usac.org/sl/applicants/step04/contract-guidance.aspx> (retrieved Jan. 16, 2009); *Requests for Waiver of the Decision of the Universal Service Administrator by Adams County School District 14, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 22 FCC Rcd 6019 (2007) (the Commission granted waivers of rule section 54.504(c) where the petitioners had legally binding agreements in place for the relevant funding years, but missed the deadline for providing evidence of a signed contract).

This letter addresses all of the outstanding issues on which USAC has sought formal guidance from the Commission. Please let me know if you have any questions.

Sincerely,

Dana R. Shaffer  
Chief  
Wireline Competition Bureau

**Table C Policy Issues**

Issue	Relevant Rule	Guidance
1. Technology Plan Deficiency – applicant's technology plan did not have all five criteria.	54.508(a), stating the required elements of a technology plan.	Recover.
2. CIPA certification violations – applicant did not comply with all CIPA requirements.	54.520(c)(1), stating the certifications required by 47 CFR § 254(h) and (l).	Recover generally; however, certain situations may not warrant recovery. <i>See</i> letter.
3. Services delivered to an entity that was not approved to receive the service on FCC Form 471 for the Funding Request Number (FRN).	4 <sup>th</sup> R & O, 19 FCC Rcd 15252, ¶15, stating that the service provider is likely to be the responsible party if it delivers services that were not approved for funding under the Form 471.	USAC should determine if the entity should have been listed on the FCC Form 471 and, if so, allow the applicant to amend the FCC Form 471. <i>See</i> letter. Otherwise recover.
4. Service provided or equipment installed at an ineligible entity or used for an ineligible purpose.	54.501(b), (c), (d), stating the requirements for eligible entities. 54.505, stating how to determine the discount for an entity. 54.507(g) stating the rules of priority. 4 <sup>th</sup> R & O, 19 FCC Rcd 15252, ¶15, stating that the service provider is likely to be the responsible party if it delivers services that were not approved for funding under the Form 471.	Recover.
5. Equipment transferred prior to 3 years after purchase or prior to closure of entity.	54.513(c), prohibiting the transfer of equipment for 3 years, with certain exceptions.	Recover.
6. No signed contract (2004 and beyond). No legally binding agreement (2003 and before).	5 <sup>th</sup> R & O, 19 FCC Rcd 15808, ¶ 48, stating that for recordkeeping purposes, applicants and service providers should keep “executed contracts, signed and dated by both parties.”	Do not recover if there was a binding agreement that was legal under state law. <i>See</i> letter.

Issue	Relevant Rule	Guidance
7. Non-telecommunications carrier provided telecommunications services.	54.501(a), stating that only telecom carriers may receive E-rate support for providing telecom services.	Recover.
8. Failure to bill for the non-discounted portion.	54.523, requiring applicants to pay their share.	Recover.
9. Funding disbursed priority two services below the funding threshold. This occurs when USAC funds priority one services that are actually priority two services because the entity has improperly categorized them and the entity's discount level is below the fundable priority two threshold for that funding year.	54.507(g), stating the rules of priority.	Recover.
10. Free services not deducted from the total pre-discounted cost of services and thus used to provide ineligible items or to provide a greater discount rate than that to which the applicant is entitled.	54.523, requiring applicants to pay their share, prohibiting the provision of rebates, defining rebates to include free services or products.	Recover.
11. Equipment not utilized (equipment has been installed but no computers are connected, or that some equipment is still in its original packaging and has not been installed).	54.507(d), setting forth the implementation deadline for non-recurring services. 54.504(b), 54.504(b)(2)(ii), requiring applicants to use services and equipment only for educational purposes.	Recovery depends on the individual situation.



Issue	Relevant Rule	Guidance
12. Could not locate equipment.	<p>54.504(b), 54.504(b)(2)(ii), requiring applicants to use services and equipment only for educational purposes.</p> <p>54.516(a), requiring applicants to maintain asset and inventory records of equipment purchased as components of supported internal connections services sufficient to verify the actual location of such equipment for 5 years.</p>	<p>Recover.</p>